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Supreme Court of the United States

OCTOBER TERM, 1938.

No. 367.

FRANK EICHHOLZ, Appellant,
vs.
PUBLIC SERVICE COMMISSION OF THE STATE OF MISSOURI, ET AL.

APPEAL FROM THE DISTRICT COURT OF THE UNITED STATES FOR THE WESTERN DISTRICT OF MISSOURI.

BRIEF ON BEHALF OF APPELLEE, PUBLIC SERVICE COMMISSION OF THE STATE OF MISSOURI.

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FRANK EICHHOLZ, Appellant,

vs.

PUBLIC SERVICE COMMISSION OF THE STATE OF MISSOURI, ROY McKITTRICK, Attorney-General of the State of Missouri, and B. M. CASTEEL, Superintendent of State Highway Patrol, Appellees.

APPEAL FROM THE DISTRICT COURT OF THE UNITED STATES FOR THE WESTERN DISTRICT OF MISSOURI.

BRIEF AND ARGUMENT OF APPELLEE.

Official Report of Decision Under Review.

The decision of the three-judge district court is reported in 23 Federal Supplement, at page 587.

Statement of Grounds of Jurisdiction.

Appellee has complied with Paragraph 1 of Rule 12 of this court in respect to jurisdiction by means of a separate printed motion to dismiss, in which it was urged, principally, there is no final judgment.

STATEMENT OF THE CASE.

Appellant, Frank Eichholz, made application for and was granted an "irregular route" interstate permit on November 23, 1934, by the Public Service Commission of the State of Missouri. The essential provisions of that permit are as follows:

Appellant's Interstate Permit.

"For authority to operate interstate as a freight carrying motor carrier over an *irregular route* as follows: From all points in Missouri to points beyond the State and from points beyond Missouri to all points within the State, exclusively in interstate commerce." (Emphasis ours.)

From the aforesaid 23rd day of November, 1934, until appellant's interstate permit was revoked by the Public Service Commission, Rule No. 44 duly promulgated by said Commission was in full force and effect. It provides as follows:

Rule No. 44.

"No driver or operator operating under an interstate permit shall accept for transportation within this state any person or property known to be destined to a point within the State of Missouri. If such interstate carrier accepts within Missouri a passenger whose destination is beyond the limits of the State of Missouri, such passenger shall not be permitted to terminate his trip within the State of Missouri; and if such interstate carrier accepts within Missouri property destined to a point beyond the limits of the State of Missouri such property shall not be terminated within the State of Missouri."

Revocation Order, Findings and Conclusions. Appellee Public Service Commission of the State of Missouri, effective December 30, 1936, revoked appellant's interstate permit aforesaid. In its report and order (R 19), appellee found (1) that appellant had been transporting freight between the docks of consignors in St. Louis, Missouri, and docks of consignees in Kansas City, Missouri, and vice versa, in intrastate commerce, under the guise of interstate commerce, in violation of his interstate permit aforesaid, and, (2) that, therefore appellant had also violated the terms of Rule No. 44 aforesaid.

Route Used St. Louis to Kansas City. Freight was hauled daily by appellant from St. Louis, Missouri, across the state over U. S. Highway No. 40 through Kansas City, Missou

(R 93) to the Mid-Central Terminal, less than one-half mile across the state line, (R 93), in Kansas City, Kansas, and thence back into Kansas City, Missouri. Appellant had continued such practice (R 89) since securing his interstate "irregular route" permit from the State of Missouri on November 23, 1934.

State Permits Not Held. Appellant has never had authority to operate as an intrastate motor carrier in Missouri (R 89). The Mid-Central Terminal of Kansas City, Kansas, has never had any authority (R 91), either interstate or intrastate, to operate as a motor carrier in Missouri.

Bill In Equity Filed. Appellant, on December 31, 1936, filed a bill in equity (R 1) and applied for and was granted a temporary restraining order to protect himself and drivers against appellee and certain other state officials whom he alleged were threatening to arrest and prosecute criminal actions against himself and his drivers (R 7). A three-judge court granted a temporary injunction (R 48).

Hearing and Decree. Thirteen months after the temporary restraining order was issued, the three-judge district court heard the matter on the merits, namely, on January 31, 1938. After hearing the evidence, including pertinent evidence concerning the character of appellant's operations between the two Missouri cities since issuance of the revocation order by the appellee, the district court on May 10, 1938, filed its decree (R 81), whereby appellant's bill in equity was dismissed and the temporary injunction was dissolved.

Findings and Conclusions. Its findings of fact (R 64) and conclusions of law (R 65) uphold in every particular those contained in the report and order of the Public Service Commission whereby appellant's interstate permit was revoked.

Counterclaim and Ruling Thereon. At the trial on the merits, Public Service Commission presented a counterclaim (R 52). The district court found in paragraph IV of its conclusions of law (R 66) that appellant was indebted to the State of Missouri for license fees and charges accumulated since the granting of the temporary restraining order, and that the State is entitled to judgment therefor. In its decree (R 81), the district court appointed a special master

". . . . . to take an accounting of such accrued and accumulating license fees (fol. 113) and other legal charges if any, and report same to this court with his findings of fact and conclusions of law. And the court hereby reserves jurisdiction of the cause till all questions arising on the counterclaim have been determined."

The Issues. Appellant contends as follows:

(1) that the true character of the freight which he has hauled between docks of shippers in St. Louis, Missouri, and docks of consignees in Kansas City, Missouri, through the Mid-Central Terminal in Kansas City, Kansas, and thence back into Missouri, is interstate commerce;

(2) that the commerce clause of the Federal Constitution and the definition of interstate commerce in the Federal Motor Carrier Act of 1935, excuse him from violations of the terms of his interstate permit granted by appellee, and from violations of the terms of Rule No. 44 promulgated by appellee;

(3) that a final judgment has been entered on the counterclaim and that the act of ascertaining the amount due from him to the State of Missouri for the use of its highways during the period of more than sixteen months the temporary injunction was in effect is a ministerial act (Br. 14);

(4) that, notwithstanding the admission by him of the fact that he is indebted to the State of Missouri for such moneys, the district court had no right to take jurisdiction of such counterclaim, first, because it was presented and urged by the Public Service Commission of the State of Missouri, and, second, because it is one not within the purview of Equity Rule No. 30.

Appellee contends as follows:

(1) that the commerce in dispute was intrastate commerce;

(2) that appellant's hauling of intrastate commerce constituted a violation of his interstate permit;

(3) that, even if the freight hauled from St. Louis, Missouri, to Kansas City, Missouri, and vice versa, was, as a matter of law, interstate commerce, such hauling constituted a violation of Rule No. 44, and was therefore unlawful;

(4) that upon the face of appellant's bill and evidence all of his haulings upon the public highways of Missouri were over "regular routes," and were therefore illegal because his interstate permit did not authorize him to use Missouri highways in interstate commerce over "regular routes";

(5) that appellant was not in "bona fide operation" as a common carrier by motor vehicle over U. S. Highway No. 40 between St. Louis, Missouri, and Kansas City, Missouri, or over any other highway route in Missouri, on and subsequent to June 1, 1935, as required by Section 206-(a) of the Federal Motor Carrier Act, 1935;

(6) that appellant could not lawfully operate intrastate without complying with Section 5268-(a) of the Missouri Bus and Truck Act;

(7) that the Public Service Commission acted within its constitutional rights in revoking appellant's interstate "irregular route" permit.

SUMMARY OF ARGUMENT.

The argument herein is presented under headings, as follows:

I. ON THE MERITS.

1. **Appellant refuses to do equity.** He admits he owes fees to the State but has persistently refused to pay them either to the Public Service Commission or the State Treasurer.

2. **Appellant not in "bona fide" operation.** Since he owes fees to the State for use of its highways by seventy (70) trucks for sixteen (16) months, the reasonableness of which has been adjudicated by prior court decision, appellant is not in "bona fide" operation as contemplated by the Federal Motor Carrier Act, 1935.

   McDonald vs. Thompson, 83 L. Ed. l. c. 169 (Advance Opinions).

   Moreover, having admitted that the Mid-Central Terminal of Kansas City, Kansas never at any time obtained a permit to operate in Missouri, appellant was likewise not in "bona fide" operation in his agency connection with the terminal which owed fees to the State of Missouri.

   McDonald vs. Thompson, 83 L. Ed. l. c. 169 (Advance Opinions);
   State ex rel. Illinois Greyhound Lines, Inc. vs. Public Service Commission, 108 S. W. (2d) 116.

3. **Appellant violated his "irregular route" permit.** Appellant held authority to operate in Missouri only over "irregular routes." He violated that authority by engaging in an intensive "regular route" use of Missouri highways. He was therefore not in "bona fide" operation, as required by the Federal Motor Carrier Act. Having disqualified himself as an interstate operator under the Federal act, he should not be per-

mitted to invoke the protection of that act as a shield against the consequences of his violations of state transportation laws.

South Carolina State Highway Dept. vs. Barnwell Bros., 82 L. Ed. 734;
McDonald vs. Thompson, 83 L. Ed. 168 (Advance Opinions).

4. **Rule No. 44.** Under this rule, which had the force and effect of law, appellant was prohibited from carrying freight from a point in Missouri to a point in Missouri in interstate commerce in the manner practiced. His permit also excluded such an operation. He accepted both and is therefore bound by their terms.

State v. Dixon, 73 S. W. (2d) 385;
Midland Realty Co. v. Kansas City P. & L. Co., 300 U. S. 109, 81 L. Ed. 540.

Rule No. 44 served useful purposes, among them disruption of rate structures. Such control of a motor carrier is not a burden on interstate commerce such as is prohibited either by the Federal Motor Carrier Act, 1935, or the Commerce Clause.

Stone v. Farmers Loan & Tr. Co., 116 U. S. 307;
Minnesota Rate Cases, 230 U. S. 352;
South Carolina State Highway Dept. vs. Barnwell Bros., 303 U. S. 177, 82 L. Ed. 734;
Kelly v. Washington, 302 U. S. 1, 82 L. Ed. 3.

5. **Character of the Commerce.** The facts in each case govern. The facts here show decided departures from rules pertaining to interstate commerce in hauling between St. Louis and Kansas City and vice versa. Appellant indulged in numerous practices of soliciting, billing, delivery, and going direct from shipper to receiver, by means of an unnecessary dart into Kansas City, Kansas, which constitute a movement of freight by subterfuge.

Cases of similar facts are as follows:

Interstate Busses Corp. v. Holyoke Street R. Co., 273 U. S. 45;
Sprout v. City of South Bend, 277 U. S. 163;
Chicago, Milwaukee & St. P. R. Co. v. Pub. Serv. Comm., 269 Mo. 63;
B. & O. R. Co. vs. *Settle*, 260 U. S. 166;
C., M., & St. P. & P. R. Co. v. Campbell River Mills Co., 53 F. (2d) 69;
Arkansas R. Comm. v. C., R. I. & P. R. Co., 274 U. S. 597;
Roundtree vs. Terrell, 22 Fed. Supp. 297.

II ON THE COUNTERCLAIM

1. **Equity Rule No. 30.** No objection was made to filing counterclaim and none should be raised now. It is within the provisions of the first division of Equity Rule No. 30 because appellant created the cause of action in the counterclaim when he sought to enjoin enforcement of order of Public Service Commission revoking his interstate permit.

   Frank Moore vs. New York Cotton Exchange, 270 U. S. 593, 70 L. Ed. 750.

2. **Appellee is the proper collecting agent.** Statutes so provide, and because statutes governing State Treasurers' duties do not provide for that officer to maintain this counterclaim. Appellant has conceded Public Service Commission is proper agent of the State of Missouri to whom to pay the fees, by his voluntary statement that he tendered fees owing by him to the State to the Public Service Commission.

ARGUMENT.

I. ON THE MERITS.

Appellant Refuses To Do Equity. *Appellee expresses the* conviction that upon consideration of equitable principles alone the judgment and decree of the District Court should be affirmed.

It may readily be determined upon a casual inspection of the face of the record in this cause that appellant owes the State of Missouri a large sum of money for license fees, as provided by Section 5272 of the Missouri Bus and Truck Act, Laws of Missouri, 1931, pages 304-316, inclusive, for the use of its public highways by approximately seventy vehicles which he admits were operated over Missouri highways in interstate commerce for the period of sixteen months commencing on December 31, 1936, and ending on May 10, 1938, being the period of time appellee and other officers of the State of Missouri were restrained by the District Court. Appellant has at all times failed and refused to pay to the State of Missouri such fees. For that failure he advances such unfounded reasons as that the District Court, under Equity Rule No. 30, did not have jurisdiction of the counterclaim, or, that the Public Service Commission is not a proper agency of the State of Missouri to maintain the cause of action pleaded in the counterclaim. If both contentions of appellant were true, he would, nevertheless, as a matter of equity, be guilty of a failure to do equity to the State of Missouri in his persistent refusal to pay into the state treasury the statutory fees which he admits he owes to the State. He seeks equity of the State, but refuses to do equity to the State.

Appellant Not in "Bona Fide" Operation. (1) As hereinafter more particularly set out, appellee contends that, as a matter of law, it is the proper agent of the State of Missouri to maintain the cause of action pleaded in the counterclaim for the collection of fees owing by appellant to the State of Missouri. It also contends that the District Court rightfully took jurisdiction of the counterclaim under the provisions of

Equity Rule No. 30. If these contentions are sustained to the satisfaction of the court, it seems quite clear that appellant stands before the court either in violation of equitable principles or at least as one who operated during the aforesaid period of sixteen months in defiance of the aforesaid Section 5272 of the Missouri Bus and Truck Law pertaining to annual license fees.

Therefore, having operated his approximately seventy vehicles upon and over the public highways of the State of Missouri for a period of sixteen months in defiance of the aforesaid section of the Missouri Bus and Truck Law pertaining to annual license fees, appellant was not in "*bona fide*" operation as a common carrier by motor vehicle, as provided by Section 206-(a) of the Federal Motor Carrier Act.

In the case of McDonald vs. Thompson, 83 L. Ed. l. c. 169 (Advance Opinions), the court said:

> "The question first to be decided is whether his claim of bona fide operation is well founded."

In the McDonald case the question under consideration was whether the State of Texas could, under its police power, deny McDonald's application on the ground that the proposed operations would subject the highways named in it to excessive burden and endanger and interfere with ordinary use by the public. McDonald claimed there, as Eichholz claims here, that, pending determination of his application for a certificate of convenience and necessity before the Interstate Commerce Commission, he was authorized to continue operations. The court held that,

> "Plainly the proviso does not extend to one operating as a common carrier on public highways of a State in defiance of its laws."

Section 5272 of the Missouri law is not questioned by appellant here. Indeed, the annual license fees provided by Section 5272 of the Missouri Act have been upheld in the case of Brashear Freight Lines, Inc., et al. vs. Public Service Commission, et al., 23 Fed. Supp. 865.

Therefore, inasmuch as appellant was operating during the aforesaid period of sixteen months, in defiance of Section 5272 of the Missouri Bus and Truck Act, and still refuses to pay to the State of Missouri the fees which he owes under that section, he was not in "*bona fide*" operation and is, therefore, not entitled to protection in his operation as a common carrier over the public highways of the State of Missouri by Section 206-(a) of the Federal Motor Carrier Act. Neither would the commerce clause of the Federal Constitution protect him against his operations in defiance of proper State laws during the period of sixteen months.

(2) Moreover, appellant states (R 91) that,

"No permit was ever obtained by the operator of the Mid-Central Terminal, and under the law none was necessary."

Appellee concedes it to be a fact that no permit, either interstate or intrastate, was ever obtained from the Public Service Commission by the operator of the Mid-Central Terminal to conduct a motor carrier operation upon the public highways of the State of Missouri. Appellee, however, refutes the suggestion that under the Missouri law no permit was required by the operator of the Mid-Central Terminal to operate its own vehicles or those of appellant between the Mid-Central Terminal in Kansas City, Kansas and docks of shippers in Kansas City, Missouri.

Section 5268-(b) of the Missouri Bus and Truck Act provides as follows:

"It is hereby declared unlawful for any motor carrier except as provided in section 5265 of this act to use any of the public highways of this state for the transportation of persons or property, or both, in interstate commerce without first having obtained from the Commission a permit so to do."

Under that provision any operations by the Mid-Central Terminal between Kansas City, Kansas and Kansas City, Missouri were illegal. Nor was it exempted from the above provision either under Section 5265 or Sections 5264-(b) and (e).

In the case of State ex rel. Illinois Greyhound Lines, I vs. Public Service Commission, 108 S. W. (2d) 116, the preme Court of the State of Missouri held that the operat of an interstate bus line which originated in Chicago, Illin and terminated in St. Louis, Missouri, at a distance of o 3.18 miles from the point where it entered the State of M souri, was amenable to the provisions of the Missouri Bus Truck Act and was required by Section 5272-(a) to one-third of the annual license fees mentioned in Section 52 (c) of the Missouri Bus and Truck Act.

It follows, therefore, that appellant did at all times eng and use the services of the Mid-Central Terminal in violat of and in defiance of the Missouri Bus and Truck Act. He at no time has he been in *"bona fide"* operation, as provi by Section 206-(a) of the Federal Motor Carrier Act. C sequently, he is not entitled to claim protection against revocation of his authority by the State of Missouri eit under the provisions of the Federal Motor Carrier Act or Commerce Clause. Having no protection under Federal l appellant must submit to State authority to revoke for g cause the permit granted to him by the State to use its pu highways.

Appellant Violated His "Irregular Route" Permit. though the question of appellant's operations over "regu routes" was not directly discussed either in the report order of the Public Service Commission or in the opin of the District Court, nevertheless, the order of the Comm sion, the findings of the District Court and the stateme of the evidence plainly reveal that appellant has engaged intensive "regular route" operations over the public highw of the State of Missouri.

"Regular" and "irregular routes" are defined in Sect 5264, Laws of Missouri, 1931, pages 304-316, inclusive, follows:

> "(g) The term 'regular route,' when used in this means that portion of the public highway o which a motor carrier usually or ordinarily oper or provides motor transportation service."

"(h) The term 'irregular route,' when used in this act, means that portion of the public highways over which a regular route has not been established."

Appellant applied for and was granted (R. 93) an "irregular route" interstate permit. He was therefore under obligation to operate as an "irregular route" interstate carrier, whereby he was privileged to transport freight, "over an irregular route,"

> "From all points in Missouri to points beyond the State and from points beyond Missouri to all points within the State, exclusively in interstate commerce."

Obviously the admission by appellant that his road haul trucks made approximately one hundred thirty (130) trips per month over U. S. Highway No. 40 between St. Louis, Missouri and Kansas City, Kansas is an admission that he adopted U. S. Highway No. 40 across the State of Missouri as a "regular route." Moreover, appellant concedes in the statement of the evidence (R. 96) that he made application to the Interstate Commerce Commission for "regular route" operations over Missouri highways.

Therefore, it is urged that appellant has long since repudiated the "irregular route" permit issued to him by the State of Missouri, and has operated over "regular routes" instead. He has never had a permit to operate over "regular routes" in Missouri.

The states have control over their highways for safety purposes. Among numerous cases announcing such a policy, the following are directly in point:

South Carolina State Highway Dept. vs. Barnwell Bros., 82 L. Ed. 734;

McDonald vs. Thompson, 83 L. Ed. 168 (Advance Opinions).

If interstate motor carriers can repudiate "irregular route" permits issued to them by the Public Service Commission under the protection of the Federal Motor Carrier Act or the Commerce Clause, unlimited numbers can with

impunity engage in "regular route" operations upon t principal highways of the State. They could so cro Missouri's principal highways as to create dangerous tra hazards. It is unthinkable that the states could thu be so completely displaced with respect to the police cont of their public highways.

Hence, it is the contention of appellee that appella has for a long time been operating in violation of his int state permit in that he has operated over "regular route instead of "irregular routes." The issuance of "irregul route" permits serves to distribute traffic. "Regular rout operations, if too numerous, tend toward congestion of traf

In the interest of safety, the Public Service Commissi is entitled to know when an interstate operator wishes to u "regular routes." Upon proper application therefor "regul routes" can be authorized, if public safety will not be jeop dized thereby, but no operator may legally apply for and ceive an "irregular route" interstate permit and thereaf wilfully engage in a "regular route" operation. Such an ope tion is not a "bona fide" one.

Rule No. 44 Discussed. Section 5276 of the Misso act under consideration provides that,

> "The orders and decisions of the Public Serv Commission on the matters covered by this act shall reduced to writing and a copy thereof, duly certifi shall be served on the motor carrier and contract hau affected thereby through the United States mail. . . .

It is taken for granted, therefore, that the Commission p formed its duty under Section 5276 and served a copy of R No. 44 on appellant as prescribed.

Appellant, therefore, at all times knew of the restrictio placed upon his operations by Rule No. 44. He voluntar accepted it. He is estopped to complain against it. T rule very plainly indicates that appellant could not p up freight at docks of consignors in St. Louis, Misso transport it across U. S. Highway No. 40 through Kan City, Missouri to the Mid-Central Terminal located one-h mile across the state line and thence transport such freig back into Kansas City, Missouri to docks of consigne

The rules of the Public Service Commission have the same force and effect as laws enacted by the legislature.

State v. Dixon, 73 S. W. (2) 385;
Midland Realty Co. v. K. C. Power & L. Co., 300 U. S. 109, 81 L. Ed. 540.

In its report and order (R. 30) the Public Service Commission recognized the fact that appellant had not only violated the express terms of Rule No. 44, but that he also had violated the express terms of his interstate permit. The permit itself provided that he was possessed of authority to operate interstate as a freight-carrying motor carrier over an "irregular route" as follows:

> "From all points in Missouri to points beyond the state and from points beyond Missouri to all points within the state, *exclusively* in interstate commerce."

There is no reason for construction of either the interstate permit possessed by appellant or Rule No. 44. The language of each is plain and unambiguous. The terms of each clearly prohibited appellant from hauling freight between docks of consignors in St. Louis, Missouri and docks of consignees in Kansas City, Missouri by the way of the one-half mile route into Kansas City, Kansas and thence back into Missouri.

It is apparent that appellant commenced hauling freight between the two Missouri cities in the manner heretofore described, at a freight rate one-third (33⅓%) lower than the intrastate freight rate fixed by the Public Service Commission of Missouri, for the primary purpose of taking the cream of the movement of intrastate freight between the two Missouri cities away from intrastate common carriers authorized to operate over "regular routes." He probably conceived that it would be impossible for him to prove convenience and necessity under Section 5268 of the Missouri Bus and Truck Act for an intrastate operation between the two Missouri cities. He knew that under the provisions of Section 5277 of the Missouri act he was not entitled to "grandfather" rights. Therefore, he chose to take the risk of getting a considerable volume of the freight movement between the two

Missouri cities in the manner indicated herein. His hook-u at Kansas City, Kansas was with a terminal company whic at no time possessed legal authority to transport freigh between Kansas City, Kansas, and Kansas City, Missouri

Obviously, it was the policy of the State not to permit us of its highways for an operation in interstate commerce whic included within the State both the point of origin and point o destination of the property to be transported. Both th permit and Rule No. 44 exclude such an operation. Suc policy permitted the State to control disruption of rate struc tures and to control undue disadvantages and preferences i intrastate commerce. Such policy gave the State better con trol over evasive instrumentalities like commercial moto vehicles.

It was this situation of disruption of rate structur and numerous other matters of vital local concern with whic Public Service Commission was confronted when it adopted th policy of restricting motor carriers with interstate permi to the use of Missouri highways only from points in Missou to points in other states, and vice versa, and promulgate Rule No. 44 in conformity therewith.

Appellant was well acquainted with this policy of th State of Missouri. By willful repudiation of it he has not on violated that policy, but has inflicted irreparable injury upo intrastate competitors who are helpless to defend or prote themselves. If these competitors were ever legally at liber to commence a so-called interstate operation between S Louis, Missouri and Kansas City, Missouri, via one-half mi in Kansas, for any reason real or pretended, that door w closed to them on June 1, 1935 by the terms of the Feder Motor Carrier Act.

Section 5267-(c) of the Missouri Bus and Truck act pr vides as follows:

> "All laws relating to the powers, duties, authori and jurisdiction of the Public Service Commission ov common carriers are hereby made applicable to all su motor carriers, except as herein otherwise specifica provided."

By reference to the general act creating the Missouri Public Service Commission in the year of 1913, there appears the following:

> "Sec. 5154. *Unreasonable Preference.*—No common carrier shall make or give any undue or unreasonable preference or advantage to any person or corporation or to any locality or to any particular description of traffic in any respect whatsoever, or subject any particular person or corporation or locality or any particular description of traffic, to any undue or unreasonable prejudice or disadvantage in any respect whatsoever."

It was to prevent the occurrence of situations mentioned in Section 5154 that prompted the Public Service Commission to promulgate Rule No. 44.

In Stone v. Farmers Loan & Trust Co., 116 U. S. 307, at page 334, Chief Justice Waite, speaking for the Court, said:

> "It" (the State of Mississippi) "may, beyond all question, by the settled rule of decision in this Court, regulate freights and fares for business done exclusively within the State, *and it would seem to be a matter of domestic concern to prevent the company from discriminating against persons and places in Mississippi.*" (Emphasis ours.)

It was said by the Supreme Court of the United States in Minnesota Rate Cases, 230 U. S. 352, l. c. 402:

> " . . . . there necessarily remains to the States, until Congress acts, a wide range for the permissible exercise of power appropriate to their territorial jurisdiction although interstate commerce may be affected. It extends to those matters of a local nature as to which it is impossible to derive from the constitutional grant an intention that they should go uncontrolled pending Federal intervention. . . . . .
>
> . . . . . Our system of government is a practical adjustment by which the National authority as conferred by the Constitution is maintained in its full scope without unnecessary loss of local efficiency. Where the

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subject is preculiarly one of local concern, and from its nature belongs to the class with which the State appropriately deals in making reasonable provision for local needs, it cannot be regarded as left to the unrestrained will of individuals because Congress has not acted, although it may have such a relation to interstate commerce as to be within the reach of the Federal power. In such case, Congress must be the judge of the necessity of Federal action. Its paramount authority always enables it to intervene at its discretion for the complete and effective government of that which has been committed to its care, and, for this purpose and to this extent, in response to a conviction of national need, to displace local laws by substituting laws of its own. The successful working of our constitutional system has thus been made possible."

In conclusion, it is contended that Rule No. 44 was controlling against Appellant in his use of those highways in the performance of a so-called interstate business which inflicted injury upon intrastate competitors.

Congress has not entered the field so as to deprive the State of its authority to say whether or in what manner its highways may be used.

Kelly v. Washington, 302 U. S. 1, 82 L. Ed. 3.

The State is free to control its highways and the traffic thereon if such is not a burden on interstate commerce. Such principle is clearly endorsed in the case of

South Carolina State Highway Department et al. v. Barnwell Brothers et al., 303 U. S. 177, 82 L. Ed. 734.

"Few subjects of state regulation are so peculiarly of local concern as is the use of state highways. There are few, local regulation of which is so inseparable from a substantial effect on interstate commerce. Unlike the railroads, local highways are built, owned and maintained by the state or its municipal subdivisions. The state has a primary and immediate concern in their safe and economical administration. The present regulations, or

any others of like purpose, if they are to accomplish their end, must be applied alike to interstate and intrastate traffic both moving in large volume over the highways. The fact that they affect alike shippers in interstate and intrastate commerce in large number within as well as without the state is a safeguard against their abuse.

From the beginning it has been recognized that a state can, if it sees fit, build and maintain its own highways, canals and railroads and that in the absence of Congressional action their regulation is peculiarly within its competence, even though interstate commerce is materially affected. Minnesota Rate Cases (Simpson v. Shepard) 230 U. S. 352, 416, 57 L. Ed. 1511, 1548, 33 S. Ct. 729, 48 L. R. A. (N. S.) 1151, Ann. Cas. 1916A, 18. Congress not acting, state regulation of intrastate carriers has been upheld regardless of its effect upon interstate commerce. Id. With respect to the extent and nature of the local interests to be protected and the unavoidable effect upon interstate and intrastate commerce alike, regulations of the use of the highways are akin to local regulation of rivers, harbors, piers and docks, quarantine regulations and game laws, which, Congress not acting, have been sustained even though they materially interfere with interstate commerce."

Character of the Commerce. It may be of convenience the Court if evidence pertaining to the character of the mmerce, as gleaned from the report and order of the Public rvice Commission, the opinion and findings of fact of the strict Court, and statements of evidence submitted by unsel, is segregated as follows:

(R 21) The Mid-Central Terminal at Kansas City, ansas, had no authority to transport property as a motor rrier into the State of Missouri.

(R 21) Appellant "filed" a so-called interstate tariff th the Interstate Commerce Commission.

(R 21) Some shippers knew of, others never heard of e Mid-Central Terminal.

(R 22) The manager of the Mid-Central Terminal testid that shipments originating in Kansas City, Missouri, des-

tined to St. Louis, Missouri, would frequently show the Mid-Central Terminal of Kansas City, Kansas, as the "shipper." When such freight was picked up in Kansas City, the bills of lading indicated that the freight was to be delivered in St. Louis, Missouri.

(**R 23**) Prior to April 1, 1936, as testified to by the Terminal manager, he collected a charge for his services in addition to the interstate freight rate, and that two sets of bills of lading were for a time used in connection with shipments of freight through his terminal between Kansas City, Missouri, and St. Louis, Missouri.

(**R 25**) All packages of freight were marked or stencilled with the name and destination of the St. Louis, Missouri, or Kansas City, Missouri, consignee. Numerous witnesses so testified.

(**R 26**) Some St. Louis shippers did not know that the freight was to move through Kansas City, Kansas. Contact was made with appellant and no contact whatsoever was made with the Mid-Central Terminal.

(**R 27**) Some St. Louis shippers did not know until the day of the hearing before the Public Service Commission that appellant stamped on bills of lading the words, "Riteway Motor Service via Kansas City, Kansas." One witness explained that two sets of bills of lading were used, one evidencing a contract of transportation from St. Louis, Missouri, to Kansas City, Kansas, and another from the Mid-Central Terminal to Kansas City, Missouri. This was done, he said, with a view of conformity to an interstate transaction. Such practice was discontinued upon information received by witness that it was no longer necessary.

(**R 28**) Appellant himself testified that he assumed responsibility for delivery of freight between St. Louis, Missouri, and Kansas City, Missouri, and that he paid the Mid-Central Terminal for all services rendered by it on his behalf.

(**R 32**) The so-called interstate tariff "filed" with the Interstate Commerce Commission quoted rates on various classes of goods between St. Louis, Missouri, and Kansas City, Kansas. It quoted the same rates between St. Louis, Missouri, and Kansas City, Missouri, with the words "interstate only"

in parenthesis. This so-called interstate tariff was regarded by the Public Service Commission as "a badge of fraud."

(R 32) The Public Service Commission found that,

". . . . . respondent has unlawfully engaged in intrastate commerce, that his transportation of intrastate shipments across a state line was a subterfuge and a fraud, that the facts determine the true character of the business in which he was engaged, ..."

(R 33) The Commission further stated:

"The violations of respondent are flagrant. The evidence shows that he is actively acquisitive and yields easily to temptation; that he has intentionally exceeded his authority; that he has violated the law and the rules of the Commission; and that he is guilty of a misdemeanor and subject to a fine or imprisonment under the applicable penal statute. Section 5275, Laws of Mo., 1931, page 314. A withdrawal of authority heretofore granted respondent appears to be fully justified and the Commission finds that his existing permit should be revoked."

(R 55) In its opinion the District Court stated that at the hearing on the temporary injunction it appeared that only a "small percentage" of freight was handled between St. Louis, Missouri, and Kansas City, Kansas, and vice versa, and that its temporary injunction was for "judicial convenience." The Court further stated that by "inference" evidence of appellant tended to prove that he selected a terminal site one-half mile across the state line in Kansas City, Kansas, because it was in the vicinity of large shippers.

(R 56) The court decided that at least forty (40%) per cent of the freight moving across Missouri on U. S. Highway No. 40 was intrastate in character.

(R 59) The court held that the route traveled and methods employed were neither normal nor natural. Such practice was not a matter of convenience either to the shipper or carrier. It found that immediately upon arrival of truckloads of freight at the terminal it was in some instances transported

back into Kansas City on the same vehicle and over the same routes and was immediately delivered in Kansas City, Missouri.

(R 61) Again the court stated that appellant intended that an "inference" should be drawn from his evidence that terminal headquarters were in Kansas City, Kansas, because of the nearness of shippers. It found, however, that the pick-up and delivery zone with a radius of twenty-five (25) miles does not sustain appellant's contentions. The court found that the location of the terminal in Kansas City, Kansas, and the twenty-five (25) mile zone was a "device" by means of which appellant could carry intrastate shipments between St. Louis, Missouri, and Kansas City, Missouri, and thereby extend to the shippers an interstate rate far below intrastate rates promulgated and approved by the Missouri Public Service Commission.

(R 89) Appellant's statement of the evidence concedes that he never sought or obtained an intrastate permit.

(R 91) It also concedes that the Mid-Central Terminal did not have a permit of any kind to operate as a motor carrier in Missouri.

(R 93) The statement of appellee reveals that appellant applied for and was granted an "irregular route" permit and that he operated approximately one hundred thirty (130) truck trips per month between his St. Louis, Missouri, and Kansas City, Kansas, terminals.

(R 94) The Supervisor of the Bus and Truck Department of the Missouri Public Service Commission, who was familiar with the exhibits applicant placed in evidence with the Interstate Commerce Commission, testified that not less than forty (40%) of freight moving over U. S. Highway No. 40 originated at and was destined to one of the two Missouri cities.

(R 94) Appellant maintained a first-class freight rate between the two Missouri cities of sixty cents (60c) per CWT. This was the rate which he "filed" with the Interstate Commerce Commission. The duly promulgated intrastate rate was ninety-two cents (92c) per CWT on first-class freight between the same two Missouri cities

(R 95) Numerous witnesses testified they did not know until the day of the hearing that their freight was handled through a terminal at Kansas City, Kansas, and that they did not direct appellant as to the routing; that appellant's solicitor urged them to use his trucks between the two cities because of his substantially cheaper interstate freight rates.

(R 95) The operator of the terminal testified that large quantities of freight originating in St. Louis, Missouri, were billed to the terminal in Kansas City Kansas, as consignee. Thereafter, such shipments were billed and transported to the true consignees in Kansas City, Missouri. He testified that shipments between St. Louis, Missouri, and destinations in Kansas or Colorado were not so handled. Full trailer loads of freight billed from a single consignor in St. Louis, Missouri, to a single consignee in Kansas City, Missouri, were driven through Kansas City, Missouri, to the terminal in Kansas City, Kansas. Sometimes these full trailer loads were unloaded at the terminal and thence transported back into Kansas City, Missouri, by means of "delivery" trucks. Sometimes these full trailer loads were driven immediately back into Missouri and unloaded at the docks of consignees. The terminal operator testified that such was the usual practice on full trailer loads.

(R 96) On the night of February 1, 1938, inspectors of the Public Service Commission made an effort to determine the true character of the commerce being handled by appellant over U. S. Highway No. 40. Eight Westbound transport trucks of appellant were inspected at scales of the Missouri State Highway Commission at a point on U. S. Highway No. 40 a short distance east of Kansas City, Missouri. Six of the eight trucks were destined to the terminal in Kansas City, Kansas. Two were destined for Wichita, Kansas. Only one of the drivers of these eight trucks would show the inspector his freight bills. The other drivers refused. The inspected truck carried a straight truck load of freight originating in St. Louis, Missouri, which was destined to a consignee at North Kansas City, Missouri. It was driven through Kansas City, Missouri, to the terminal in Kansas City, Kansas. The inspector saw that same trailer load of freight unloaded at

docks of consignee in North Kansas City, Missouri. Another truck was followed with similar results.

(R 96) Appellant concedes that he has applied to the Interstate Commerce Commission for authority to engage in interstate commerce over "regular routes" between his various terminals, using Missouri highways. His evidence supporting such application was presented to the Interstate Commerce Commission during the month of July, 1937.

It is the contention of appellee that the foregoing evidence, segregated for the convenience of the court, shows that the character of the freight which appellant transported from docks of shippers in St. Louis, Missouri, to docks of consignees in Kansas City, Missouri, was intrastate. Realizing that the question of determining whether freight is interstate or intrastate in character is dependent upon the facts in each particular case, appellee submits the foregoing extracts of the evidence as a fair cross-section of it.

Since certain facts pertaining to the character of the commerce were so exclusively within the knowledge and possession of the appellant, appellee filed a motion (R 52) asking for the appointment of a special master. It was the conception of appellee at that time that an intensive investigation of appellant's operations would be required to determine beyond a possibility of doubt the amount of freight that was actually moving between docks of consignors in St. Louis, Missouri, and docks of consignees in Kansas City, Missouri, and vice versa, and the character of that movement. The trial court, however, heard the case itself. Appellee's investigations were somewhat curtailed as compared with an investigation which might have been conducted before a special master.

Nevertheless, it seems there can be no doubt but that there was a large volume of freight moving between the two Missouri cities in the manner heretofore described. It appears that the trial court believed that appellant endeavored to conceal the actual facts concerning the character and quantity of freight moving between the two Missouri cities. It is a fact that on the night state inspectors stopped part of appellant's trucks, seven of them refused to show their freight bills. Two of the eight told inspectors that they were going to

Wichita, Kansas. The freight bills of the single truck which was inspected revealed that the truck contained a full load of merchandise for Kansas City, Missouri. Is it not plausible that the drivers who refused inspection of their freight bills and cargo might also have been hauling merchandise billed to Kansas City, Missouri? Inspectors actually saw two of these full truck loads go through Kansas City, Missouri, to the terminal one-half mile over the line in Kansas City, Kansas, and thence within a very short time go back into Kansas City, Missouri, where their cargoes were unloaded. The drivers knew the inspectors were watching them. All eight of them had been stopped at the scales. One might indulge in the inference that all eight of the truckloads were destined to Kansas City, Missouri, and that all eight of them would have gone directly to docks of consignees in Kansas City, Missouri, without the sham of the unnecessary trip into Kansas City, Kansas, except for the fact that the drivers knew they were being watched. The three-judge court no doubt gave careful consideration to the probative value of the evidence.

The following quotation from the case of Interstate Busses Corp. v. Holyoke Street R. Co., 273 U. S. 45, 71 L. ed. 530, is pertinent in the instant case:

> "*The burden is upon appellant* to show that enforcement of the Act operates to prejudice interstate carriage of passengers. The stipulated facts do not so indicate. The threatened enforcement is to prevent appellant from carrying intrastate passengers *without license* over that part of its route which is parallel to the street railway.
>
> * * * * * * * * *
>
> It is not shown that the two classes of business are so commingled that the separation of one from the other is not reasonably practicable or that appellant's interstate passengers may not be carried efficiently and economically in busses *used exclusively for that purpose* or that appellant's interstate business is dependent in any degree upon the local business in question. *Appellant may not evade the Act by the mere linking of its intrastate transportation to*

its interstate or by the unnecessary transportation of both classes by means of the same instrumentalities and employees.

* * * * * * * * * * *

There is no support for the contention that the enforcement of the Act deprives it of its property without due process of law. *Undoubtedly, the State has power in the public interest reasonably to control and regulate the use of its highways so long as it does not directly burden or interfere with interstate commerce.* (Citing cases) The terms of the Act are not arbitrary or unreasonable. *Appellant has not applied for and does not show that it is entitled to have a license from the local authorities or a certificate of public necessity and convenience from the department.* Plainly, it has no standing to attack the validity of the statute as a violation of the due process clause."

In the case of Sprout vs. City of South Bend, 277 U. S. 163, l. c. 168, the Court said:

"He made stops habitually at points within Indiana in order to permit passengers from South Bend to leave the bus before the state-line was reached. The legal character of this suburban bus traffic was not affected by the device of requiring the payment of a fare fixed for some Michigan point or by Sprout's professing that he sought only passengers destined to that State. *The actual facts govern. For this purpose, the destination intended by the passenger when he begins his journey and known to the carrier, determines the character of the commerce.*"

If the actual facts govern, it would seem that, in the instant case, the Court will find the commerce is intrastate. Appellant knew both the intention of the carrier and the destination of the freight.

For other leading cases supporting the authority of the state where the character of the commerce was similar to the commerce described in this record, reference is made to the following:

Detroit-Cincinnati Coach Lines vs. P. U. C. of Ohio, 119 Ohio 324;
Inter-City Coach Company vs. Atwood, 21 F. (2d) 83, 85;
Blackmore vs. P. S. C., 183 Atl. 115;
Clark vs. Poor, 274 U. S. 554.

In the case of State ex rel. C., M. & St. P. R. Co. vs. P. S. C., 269 Mo. 63, it was held that grain shipped from Missouri points to Kansas City, Missouri, is intrastate and the "holding" of the cars on siding in Kansas for the convenience of the railroad company is no authority for the carrier to charge interstate rates. It is very apparent in the instant case that plaintiff, for no other reason than for the purpose of deliberately changing the character of the commerce, takes large quantities of Missouri shipments through Kansas. See also the case of Bishop vs. St. L. & S. F. R. Co., 54 S. W. (2d) 480, where transportation of cattle into Kansas without the knowledge or consent of plaintiff was made by defendant on its own volition. Since the actual route was wholly within Missouri, the court held the commerce to be intrastate.

It was held in the case of B. & O. R. Co. vs. Settle, 67 L. Ed. 189, 260 U. S. 166, that, when it is admitted that a shipment from one state into another was originally intended for the point which it ultimately reached, *the intention governs the rate to be paid*, and not the mere facts of the presence or absence of through billing, continued possession by carrier, or unbroken bulk, which are without legal significance. The instant case is quite similar to the Settle case because both shippers and plaintiff intended that the ultimate destination of shipments should be in Missouri; yet the freight was unnecessarily carried into Kansas and thence into Missouri for no other purpose than to allow the shipper to avail himself of a cheaper, unregulated interstate rate, and to allow the carrier the resulting benefit over intrastate carriers by means of an unregulated so-called interstate haul.

In the case of C., M. St. P. & P. R. Co. v. Campbell River Mills Co., 53 F. (2d) 69, 73, the court announced the following rule:

> "Assuredly, if there is any serious doubt as to whether the shipment was interstate, this doubt should be resolved in favor of the intrastate character of the transaction: 'The intention to interfere with the state function of regulating intrastate rates is not to be presumed. Where there is a serious doubt whether an order of the Interstate Commerce Commission extends to intrastate rates, the doubt should be resolved in favor of the state power.'"

Arkansas Railroad Commission et al., v. Chicago, Rock Island & Pacific R. Co., 274 U. S. 597, 603, 47 S. Ct. 724, 726, 71 L. Ed. 1224.

The judgment of the lower court is affirmed.

The only motor carrier case relied upon by appellant in his claim that the freight transported between docks of consignors in St. Louis, Missouri and docks of consignees in Kansas City, Missouri was interstate in character is that of Roundtree v. Terrell et al., 22 Fed. Supp. 297. The Roundtree case is easily distinguishable from the instant case.

First. The opening paragraph of the opinion states that,

> "Prior to the passage of the Federal Motor Carrier Act, on June 13, 1934, the Railroad Commission of Texas *issued him an interstate certificate authorizing him to transport*, interstate commerce, *over Texas highways between Fort Worth and Texarkana.*"

As to the use of the Texas highways, the State of Texas had specifically authorized Roundtree to operate over them "between Fort Worth and Texarkana." In other words, the State itself had authorized him to conduct an interstate business over a "regular route" between Fort Worth, Texas and Texarkana. Furthermore, he later made application to the Interstate Commerce Commission for authority to operate in interstate commerce over this identical "regular route."

Appellant in the instant case did not have any "regular route" authority whatsoever to operate between St. Louis,

Missouri and Kansas City, Kansas in interstate commerce over U. S. Highway No. 40; nor did he have "irregular route" authority for operation between two points in Missouri. So far as appellant's operation between St. Louis, Missouri and Kansas City, Missouri, via the terminal in Kansas City, Kansas, is concerned, appellant commenced such operation subsequent to or on the date of April 1, 1936. In the Texas case the plaintiff at all times possessed state authority for the use of the Texas highways. Consequently, the use of the Texas highways was not a point in issue in the Roundtree case.

Second. There is also a differentiation between the two cases on the question of the character of the commerce. In the instant case it was shown that full truck loads of freight from St. Louis, Missouri, consignors to Kansas City, Missouri, consignees go to or near the terminal in Kansas City, Kansas, and are from there returned in the same trailer to the dock of the consignee in Kansas City, Missouri. No such evidence of this character appears in the Texas case. Further, the evidence in the instant case shows numerous attempts on the part of appellant, who in many instances is aided by the shippers, deliberately to handle the St. Louis, Missouri, to Kansas City, Missouri, shipments in such manner as to evade the rules of billing and hauling applicable to it.

Third. There was no showing in the Texas case that intrastate commerce was being discriminated against by the operations of Roundtree. Discrimination is a question of importance in the case before this Court.

II. ON THE COUNTERCLAIM

Equity Rule No. 30. The counterclaim was deposited with the clerk (R. 52) on February 2, 1938, the same day on which the injunction suit was tried on the merits. In its opinion filed on March 24, 1938, the District Court indicated for the first time that it would take jurisdiction of the counterclaim. In its decree filed on May 10, 1938 Jay M. Lee of Kansas City, Missouri (R. 81) was appointed special master to hear the counterclaim.

On the question of the filing of the counterclaim (R. 62) the District Court said:

"No objection having been made to the filing of the counterclaim, this court will not interpose one under the circumstances of the case. The question having been presented, it should be considered by us."

Appellant contends that the counterclaim is not within the provisions of Equity Rule No. 30.

In the case of Frank Moore vs. New York Cotton Exchange, 270 U. S. 593, 70 L. Ed. 750, the court upheld jurisdiction of a counterclaim under similar circumstances, as follows:

"2. Equity Rule 30 in part provides:

'The answer must state in short and simple form any counterclaim arising out of the transaction which is the subject matter of the suit, and may, without cross bill, set up any set-off or counterclaim against the plaintiff which might be the subject of an independent suit in equity against him, and such set-off or counterclaim, so set up, shall have the same effect as a cross suit, so as to enable the court to pronounce a final judgment in the same suit both on the original and the cross claims.'

Two class of counterclaims thus are provided for: (a) One 'arising out of the transaction which is the subject matter of the suit,' which must be pleaded, and (b) another 'which might be the subject of an independent suit in equity,' and which may be brought forward at the option of the defendant. We are of opinion that this counterclaim comes within the first branch of the rule; and we need not consider the point that, under the second branch, Federal jurisdiction independent of the original bill must appear, as was held in Cleveland Engineering Co. v. Galion Dynamic Motor Truck Co. (D. C.), 243 Fed. 405, 407.

The bill sets forth the contract with the Western Union and the refusal of the New York Exchange to allow appellant to receive the continuous cotton quotations, and ask a mandatory injunction to compel appellees to furnish them. The answer admits the refusal and justifies it. The counterclaim sets up that, nevertheless, appellant is purloining or otherwise illegally obtaining

them, and asks that this practice be enjoined. 'Transaction' is a word of flexible meaning It may comprehend a series of many occurrences, depending not so much upon the immediateness of their connection as upon their logical relationship. The refusal to furnish the quotations is one of the links in the chain which constitutes the transaction upon which appellant here bases its cause of action. It is an important part of the transaction constituting the subject matter of the counterclaim. It is the one circumstance without which neither party would have found it necessary to seek relief. Essential facts alleged by appellant enter into and constitute in part the cause of action set forth in the counterclaim. That they are not precisely identical, or that the counterclaim embraces additional allegations, as, for example, that appellant is unlawfully getting the quotations, does not matter. To hold otherwise would be to rob this branch of the rule of all serviceable meaning, since the facts relied upon by the plaintiff rarely, if ever, are, in all particulars, the same as those constituting the defendant's counterclaim. Compare Xenia Branch Bank v. Lee, 7 Abb. Pr. 372, 390-394. And see generally, Cleveland Engineering Co. v. Galion Dynamic Motor Truck Co., supra, p. 408 (243 Fed.); Champion Spark Plug Co. v. Champion Ignition Co. (D. C.), 247 Fed. 200, 203-205.

So close is the connection between the case sought to be stated in the bill and that set up in the counterclaim, that it only needs the failure of the former to establish a foundation for the latter; but the relief afforded by the dismissal of the bill is not complete without an injunction restraining appellant from continuing to obtain by stealthy appropriation what the court had held it could not have by judicial compulsion."

It is the conviction of appellee that its counterclaim clearly falls within that class of counterclaims "arising out of the transaction which is the subject matter of the suit." It is suggested by appellee that the "transaction" out of which the counterclaim arose was the Commission's order of revoca-

tion. Appellant created the cause of action expressed in t counterclaim by attacking that order of revocation. Even the court does not agree that the relation of the "transactio and the "counterclaim" are precisely as just stated, it w appreciate the fact that the counterclaim is, nevertheless, o within the provision of the first branch of Equity Rule N 30, if the rule is liberally construed.

Appellee Proper Collecting Agent. Although appella in the Assignment of Errors, on page six of his brief, does n dispute the authority of appellee to maintain an action collect fees due to the State of Missouri under the provisio of the Missouri Bus and Truck Act, he does dispute th authority in argument on page twenty-five of his brief. page twenty-six of his brief appellant states as follows:

> "Therefore, if plaintiff owes fees for the use of t highways of the state, he owes them to the State Tre urer, and not to the appellee Public Service Commissio

It is doubtful that such statement made by appellan consistent with equitable principles. If there is one thing t is beyond doubt, it is that appellant owes the State of Miss fees for the use of its highways upon which seventy (70) of trucks operated for a period of sixteen months. Now he s gests to the court at least a doubt as to whether or not he o fees to the state. He seeks equity, but is not willing to equity.

Appellant suggests that, if he owes any fees, he owes th to the State Treasurer. It will be presumed that if the S Treasurer is the proper agent of the State of Missouri to m tain an action against appellant for fees, he would have since commenced an action against appellant for such In the absence of such an action it should be presumed that State Treasurer is not the proper agent of the state to main such an action.

Section 11425, R. S. Mo. 1929, pertaining to the duti the State Treasurer, reads in part as follows:

> "The state treasurer shall *receive and keep*, as prov by law, all the moneys of the state not expressly requ by law to be received and kept by some other per

disburse the public moneys upon warrants drawn on the treasury according to law, and within the time limited in the Constitution, and not otherwise; keep a just and true account of the funds and the appropriations made therefrom by law, and the disbursements made thereunder."

The state treasurer is the one who "*shall receive and keep,* as provided by law, all the moneys of the state."

The foregoing description of the duties of the state treasurer is wholly consistent with the provisions of Section 5272 of the Missouri Bus and Truck Act, which provides that, annually, all motor carriers shall

"pay to the state treasurer of the state of Missouri the annual license fee, as set out in this act, for the maintenance and repair of the public highways; . . . . . The Commission, upon the issuance of a license for any vehicle, as defined in this act, shall notify the state treasurer who shall receive the license fee for such vehicle; . . . . . ."

Sections 11425 and 5272 are consistent with the policy of the State that the state treasurer shall receive and keep moneys of the state when delivered to him by duly authorized collecting agents of the state.

Section 11465, R. S. Mo. 1929, further shows it to be the policy of the state that the state treasurer is the receiving agent and the state treasury is the depository of state moneys. Such section provides in part as follows:

"All moneys now belonging to or that may at any time hereafter belong to the state, that is now in the state treasury or that hereafter may be required by law to be paid into the treasury for any purpose whatever, shall immediately on receipt thereof be deposited by the treasurer to the credit of the state, for the benefit of the fund to which such moneys respectively belong, ..."

It is suggested, therefore, that there is no merit in t contention of appellant that the state treasurer would be t proper agent of the state to maintain an action against hi for fees, if he owes any.

Moreover, on page four of his brief, appellant states th

> "No injunctive relief was sought to restrain the Sta Treasurer from collecting lawful licenses and oth fees that would accrue during such operations, sa Treasurer being the official designated by statute *receive* such licenses and fees."

This statement is a tacit admission that the state treasurer not the proper agent of the state to maintain an action agai appellant for fees which he owes. Moreover, it is repeat that if appellant contends the state treasurer is the prop agent to whom fees owing by him should be paid, it was h duty long since to have paid them to the state treasurer.

Indeed, appellant admits that the Public Service Co mission is the proper agent to whom he should have paid fe He stated (R 92) as follows:

> "Since that time a tender of the fees was made, b the Public Service Commission refused such tend Consequently, no fees have been paid since the revocati of appellant's permit."

The record discloses that any tender of fees which a pellant may have made to the appellee was made prior to t filing of the counterclaim. Now, even though the distr court has entered a judgment against him on the count claim, he refuses to pay the fees to the agent of the State whom he claims he once tendered fees. If he tendered the it was at a time when the amount thereof due the State wou have been very uncertain. However, the District Co (R 63) gave him an opportunity to negotiate and agree w appellee on the amount of fees owing by him in order to obvi the necessity of appointing a Special Master.

If appellant was willing to do equity, he might at le have tendered fees owing by him to the State Treasurer, t official whom he contends is the proper agent of the State

collect fees owing by him. He could now tender the amount of the judgment on the counterclaim to the State Treasurer. Since he seeks equity, he should be willing to do equity.

Appellant well knows that throughout the time he has operated as a common carrier upon Missouri highways, he has always paid fees as provided by the Missouri Bus and Truck Act to the Public Service Commission, and that he has never paid any fees whatsoever at the office of the State Treasurer.

Section 5267-(a) provides:

> "The Public Service Commission is hereby vested with power and authority, and it shall be its duty to license, supervise regulate every motor carrier in this state . . . . . ."

Section 5268-(b) provides in part as follows:

> "It is hereby declared unlawful for any motor carrier except as provided in section 5265 of this act to use any of the public highways of this state for the transportation of persons or property, or both, in interstate commerce without first having obtained from the Commission a permit so to do."

Imposition upon the Commission of the duty to license necessarily implies the duty to collect the license fee. What would be more impractical than the suggestion that the Commission should transmit to the state treasurer information concerning its intentions to issue an annual license or a temporary license, which would serve no other purpose than that of bringing together the treasurer and the motor carrier on the matter of the amount of fees owing by the latter to the former? It is not the intention of the law to set up such an unworkable administration of the Missouri Bus and Truck Act. It is suggested that it was the intention of the Legislature to have the Public Service Commission collect the fees from motor carriers and maintain any action for delinquent fees owing under the law and rules of the Commission.

Section 5268-(b) of the Missouri Bus and Truck Act provides in part as follows:

"PROVIDED that the Public Service Commission may issue temporary permits to interstate carriers without such hearing and notice for occasional trips, not exceeding one in any calendar month. Such temporary permits shall be issued only upon the payment of such fees as may be designated by the Public Service Commission and the making of satisfactory proof that the carrier has in force a liability insurance policy or bond . . . . ."

Section 5272 provides in part as follows:

"In case of emergency or usual temporary demand for transportation, the license fee or (for) additional motor vehicle for limited periods shall be fixed by the Commission in such reasonable amount as may be prescribed by general or temporary order. The Commission, upon the issuance of a license for any vehicle, as defined in this act, shall notify the state treasurer who shall receive the license fee for such vehicle; . . . . . ."

The court may well make the deduction that the Commission, acting under the foregoing authority, has promulgated proper rules setting up license fees collectible by it for vehicles making occasional or temporary trips over the highways of Missouri.

Finally, attention of the court is drawn to the fact that the Attorney General of the State of Missouri was named as a defendant in Appellant's bill praying for an injunction. He not only filed a separate answer for himself, but also one for the State Highway Patrol. The court may well assume that, since the matters in issue received the attention of the Attorney General, he himself decided that the Public Service Commission was the proper agent of the State to maintain the counterclaim against appellant for collection of fees. Otherwise it would have been the duty of the Attorney General to have brought an action on behalf of the State of Missouri in the name of the State Treasurer or the proper collecting agent. Therefore, it is the contention of appellee that it is the proper agent of the State to maintain the counterclaim against appellant for the fees which he clearly owes to the State for the use of its highways in the operation of seventy (70) trucks for a period of sixteen (16) months.

CONCLUSION.

It is respectfully submitted that,

(1) the Court should dismiss the appeal on the equitable principle that appellant has failed to do equity;

(2) the Court should dismiss the appeal because there is no final judgment, or

(3) the Court should affirm the judgment of the District Court wherein the temporary injunction was dissolved and appellant's bill in equity dismissed, and affirm judgment on the counterclaim as determined by the Court in its separate hearing thereon.

Respectfully submitted,

JAMES H. LINTON,
General Counsel,
DANIEL C. ROGERS,
Assistant Counsel,
Counsel for Appellee.

APPENDIX

MISSOURI BUS AND TRUCK LAW

Be it enacted by the General Assembly of the State of Missouri, as follows:

* * * * * *

ARTICLE 8.

Sec. 5264. Definitions.—(a) The term "motor vehicle," when used in this act, means any automobile, automobile truck, motor bus, truck, bus, or any other self-propelled vehicle not operated or driven upon fixed rails or tracks.

(b) The term "motor carrier," when used in this act, means any person, firm, partnership, association, joint-stock company, corporation, lessee, trustee, or receiver appointed by any court whatsoever, operating any motor vehicle with or without trailer or trailers attached, upon any public highway for the transportation of persons or property or both or of providing or

furnishing such transportation service, for hire as a comm carrier. *Provided, however*, this act shall not be so construed to apply to motor vehicles used in the transportation of p sengers or property for hire, operating over and along regu routes within any municipal corporation or a municipal corpo tion and the suburban territory adjacent thereto forming a p of transportation system within such municipal corporation such municipal corporation and adjacent suburban territo where the major part of such system is within the limits of s municipal corporation.

* * * * * * *

(e) The term "suburban territory," when used in t act, means that territory extending one mile beyond the c porate limits of any municipality in this state and one m additional for each 50,000 population or portion thereof. P vided that when more than one municipality is contained wit the limits of any such territory so described, motor carri operating in and out of any such municipalities within s territory shall be permitted to operate anywhere within t limits of the larger territory so described.

(f) The term "public highway," when used in this a means every public street, alley, road, highway, or thoroughf of every kind in this state used by the public, whether actua dedicated to the public and accepted by the proper authorit or otherwise.

(g) The term "regular route," when used in this a means that portion of the public highway over which a mo carrier usually or ordinarily operates or provides motor tra portation service.

(h) The term "irregular route," when used in this a means that portion of the public highways over which a regu route has not been established.

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Sec. 5265. Exemptions—police control over highways. The provisions of this act shall not apply to any motor vehi of a carrying capacity of not to exceed five persons, or o ton of freight, when operated under contract with the fede government for carrying the United States mail and when the trip provided in said contract; nor to any motor vehi

owned, controlled or operated as a school bus; nor taxicab, as herein defined; nor to motor vehicles used exclusively in transporting farm and dairy products from the farm or dairy to a creamery, warehouse, or other original storage or market, and transporting stocker and feeder livestock from market to farm or from farm to farm nor to motor vehicles used exclusively in the distribution of newspapers from the publisher to subscribers or distributors. No provision of this act shall be so construed as to deprive any county or municipality within this state of the right of police control over the use of its public highways, or the state highway commission of the right of police control over the use of state highways. This act shall not apply to trucks used in work for the state or any civil subdivision thereof.

Sec. 5266. Charges to be just and reasonable.—All charges made by any motor carrier or contract hauler for any service rendered, or to be rendered, in the transportation of persons or property or both shall be just and reasonable and every unjust and unreasonable charge for such service or any part thereof is prohibited and declared unlawful.

Sec. 5267. Power and authority of public service commission.—(a) The Public Service Commission is hereby vested with power and authority, and it shall be its duty to license, supervise and regulate every motor carrier in this state to fix or approve the rates, fares, charges, classifications, and rules and regulations pertaining thereto; to regulate and supervise the accounts, schedules, service and method of operating of same; to prescribe a uniform system and classification of accounts to be used, which among other things shall set up adequate depreciation charges, and after such accounting system shall have been promulgated, motor carriers shall use no other; to require the filing of annual and other reports and any other data; and to supervise and regulate motor carriers in all matters affecting the relationship between such motor carriers and the public.

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(c) All laws relating to the powers, duties, authority and jurisdiction of the Public Service Commission over common carriers are hereby made applicable to all such motor carriers, except as herein otherwise specifically provided.

(d) A motor carrier not operating over a regular route may, within the territory permitted to be served by him, receive persons or property at a point located on a regular route and destined to a point not located on a regular route, and receive persons or property at a point not located on a regular route and destined to points on a regular route.

(e) It shall be unlawful for any motor carrier, except one having a certificate of convenience and necessity authorizing such service, to accept persons or property for transportation from a point on a regular route destined to a point on a regular route, or where through or joint service is being operated between such points, and any motor carrier so offending shall be guilty of a misdemeanor and punished as provided by section 5275 of this act.

Sec. 5268. (a) **Hearing—notice—certificate—interstate permit rules—temporary permits.—It is hereby declared unlawful for any motor carrier to operate or furnish service as a common carrier within this state without first having obtained from the commission a certificate declaring that public convenience and necessity will be promoted by such operation.** The Commission upon the filing of a petition for a certificate of convenience and necessity shall within a reasonable time fix a time and place for hearing thereon. The Commission shall cause a copy of such petition and notice of hearing thereon to be served at least ten days before the hearing upon the officers or owners of every common carrier that is operating or has applied for a certificate of convenience and necessity to operate in the territory proposed to be served by the applicant, and on the city clerk of any city into or through which said motor carrier may desire to operate, and any such common carrier or city is hereby declared to be an interested party to said proceeding and may offer testimony for or against the granting of such certificate, and any other person or persons who might in the opinion of the Commission, be properly interested in or affected by the issuance of said certificate, be by the Commission made a party, and may offer testimony for or against the granting of such certificate. If the Commission shall find from the evidence that public convenience and necessity will be promoted by the creation of the service proposed, or any part thereof, as the

Commission shall determine, a certificate therefor shall be issued. In determining whether or not a certificate of convenience and necessity should be issued, the Commission shall give reasonable consideration to the transportation service being furnished by any railroad, street railroad or motor carrier, and shall give due consideration to the likelihood of the proposed service being permanent and continuous throughout twelve months of the year, and the effect which such proposed transportation service may have upon other transportation service being rendered. *Provided, however,* no vested right shall accrue to any certificate of convenience and necessity; *and provided further,* that the issuance of a certificate of convenience and necessity to one carrier shall not prohibit the granting of such certificate to another carrier over the same route if in the opinion of the Commission the public convenience and necessity will be promoted by so doing.

(b) It is hereby declared unlawful for any motor carrier except as provided in section 5265 of this act to use any of the public highways of this state for the transportation of persons or property, or both, in interstate commerce without first having obtained from the Commission a permit so to do. The Commission upon the filing of a petition for an interstate permit shall within a reasonable time fix a time and place for a hearing thereon. The Commission shall cause a copy of such petition and notice of hearing thereon to be served upon the secretary of the state highway Commission and upon the proper officer of each municipality maintaining the highway over which proposed interstate permit is desired, and each party so notified is hereby declared to be an interested party to said proceeding and may offer testimony as to the use and regulation of that part of said highway coming under its maintenance and police regulation. In determining whether or not a permit should be issued, the Commission shall give consideration to the kind and character of vehicles permitted over said highway and shall require the filing of a liability insurance policy or bond in some insurance company, association, or other insurer authorized to transact insurance business in this state, in such sum and upon such conditions as the commission may deem necessary to adequately protect the interest of the public in its use of the highway, which liability

insurance shall bind the obligors thereunder to make compensation for injuries to persons or loss of or damage to property resulting from the negligent operation of such interstate motor carriers. *Provided*, that the Public Service Commission may issue temporary permits to interstate carriers without such hearing and notice for occasional trips, not exceeding one in any calendar month. Such temporary permits shall be issued only upon the payment of such fees as may be designated by the Public Service Commission and the making of satisfactory proof that the carrier has in force a liability insurance policy or bond in some reliable insurance company or association or other insurer satisfactory to the Commission and authorized to transact insurance business in this state in such sum and upon such conditions as the Commission may deem necessary to adequately protect the interests of the public in the use of the highways and with due regard to the number of persons and amount of property transported, which liability insurance shall bind the obligors thereunder to make compensation for injuries to persons and loss or damage to property resulting from the negligent operation of vehicles under such temporary permit, and all applicants for such temporary permit shall designate in writing the Secretary of the Public Service Commission as its authorized agent upon whom legal service may be had in all actions arising in this state from any operation of motor vehicles under authority of such temporary permit. The form of and procedure for obtaining such temporary permit shall be prescribed by the Public Service Commission. Such ports of entry or exit may be established by the Commission as in its judgment may be necessary for the proper administration of this act. In the event of the establishment of any port or ports of entry or exit the expense of the establishment and maintenance of each such port shall be paid out of the receipts at each port derived from the sale of temporary permits to interstate carriers.

(c) Where a certificate such as provided for in subsection (a) of this section shall have been issued and thereafter the motor carrier to whom such certificate shall have been issued shall sell, transfer or assign the business, rights and/or assets of such motor carrier, or any part thereof, then and in that

event the said certificate originally issued to such motor carrier, or the part so sold, shall, upon application to the Commission, if the Commission shall be of the opinion that the purchaser thereof is in all respects qualified under the provisions of this act, to conduct the business of a motor carrier within the meaning of this act, be by the Commission transferred to the purchaser and be effective in like manner as though originally issued to such purchaser. *Provided*, no certificate shall ever be allowed a value in any sale or transfer, or assignment of business rights or assets. In the event of such purchase, when there is a consolidation of one or more certificates of convenience and necessity and when through service will be beneficial to the public, such through service may be permitted.

(d) The Commission shall adopt rules prescribing the manner and form in which motor carriers shall apply for certificates and permits required by this act. Among other rules adopted, there shall be rules as follows: (1) Application shall be in writing. (2) Shall contain full information concerning the ownership, financial condition, equipment to be used, and the physical property of the applicant. (3) The complete route over which the applicant desires to operate or the territory which applicant desires to serve. (4) The proposed rates, schedule, or schedules, or time cards of the applicant. (Laws of Mo., 1935, p. 324.)

Sec. 5269. Discontinuance of service—forfeiture—suspension—revocation.—No motor carrier authorized under the provisions of this act to operate within the state of Missouri shall abandon or discontinue any service established under the provisions of this act without an order of the Commission therefor, which said order shall be granted only by the Commission after hearing upon due notice. The Commission may at any time, for good cause, suspend, and upon at least ten days' notice to the grantee of any certificate, and an opportunity to be heard, revoke, alter or amend any certificate issued under the provisions of the act; *provided*, that on finding of the Commission that any motor carrier does not give convenient, efficient and sufficient service in accordance with the orders of the Commission, such motor carrier shall be given a reasonable time, not more than sixty days, to provide such

service before any existing certificate is cancelled or revo
or a new one granted to some other motor carrier over the s
route.

**Sec. 5270. Powers of commission—laws applicabl
authorization permit—motions for rehearing, review, appea**
(a) The public service commission is hereby vested with po
and authority and it shall be its duty to license, supervise
regulate every contract hauler in this state except as provide
section 5265 of this act and to approve schedules containing
minimum charges of such contract haulers and to presc
reasonable rules and regulations governing the filing and k
ing open for public inspection of such schedules: To presc
after hearing and upon complaint on its own initiative
minimum charge, or such rule, regulation or practice as it
judgment may be necessary and consistent with the pu
interest after giving due consideration to the cost of the ser
and providing that such minimum charges shall give no ad
tage or preference to any such contract hauler in competi
with any common carrier subject to this act.

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Sec. 5272. Annual license fee—allocation—penalty.
In addition to the regular registration license fee imposed o
motor vehicles in this state, and its personal property
every motor carrier, except as provided in section 5265 of
act shall, at the time of the issuance of a certificate of
venience and necessity and/or an interstate permit, and
nually thereafter, on or between January 1, and January
each calendar year, pay to the state treasurer of the sta
Missouri the annual license fee, as set out in this act, fo
maintenance and repair of the public highways; all such
levied upon the issuance of a license to any motor carrier fo
motor vehicle hereunder shall be reckoned from the begi
of the quarter in which such license was issued; *provided,
ever*, that no motor vehicle coming within the provisions o
act shall be used or licensed which has a greater dimensi
weight than is now or may hereafter be provided by law.
cases where the mileage of any route covered by any certi
of convenience and necessity and/or an interstate p

issued under the provisions of this act shall be in question, the Public Service Commission shall by order determine such question and the order of the Public Service Commission in such cases shall be final. For the purpose of determining the mileage of any such route, the certificate of the state highway commission, with respect to state highways, the county engineer, with respect to county or other highways not constituting a part of the state highway system, or of the streets of any municipal corporation, and in the case of streets in any municipal corporation, the certificate of any city engineer or mayor shall be accepted by the Public Service Commission as conclusive evidence. *Provided*, that where a motor carrier is operating within this and an adjoining state and the total mileage of said route in Missouri is ten miles or less, the license fee shall be one-third of the license fee hereinafter set out. *Provided further*, that where a motor carrier is operating a route in this state, the total mileage of which is not greater than twenty miles, the license fee shall be one-half of the license fee hereinafter set out. In case of emergency or usual temporary demand for transportation, the license fee or additional motor vehicle for limited periods shall be fixed by the Commission in such reasonable amount as may be prescribed by general or temporary order. The Commission, upon the issuance of a license for any vehicle, as defined in this act, shall notify the state treasurer who shall receive the license fee for such vehicle; and the Commission shall also notify the state treasurer of the number of lineal miles of route used by the owner of that vehicle and the number of miles in which it operates on state roads, the number of miles it operates on county roads and the number of miles it operates on city roads not maintained by the state highway commission, and the state treasurer shall distribute and credit to the state highway commission and to the proper county or city in the proportion that the number of lineal miles of route used by the licensed motor vehicle in each case bears to the number of lineal miles of route over which such carrier operates and the said funds so derived from said license shall be used for the maintenance and repair of the highways and streets over which said carrier operates.

(b) For each motor vehicle operating under a certificate of convenience and necessity or interstate permit as a passenger-carrying vehicle, the sum of ten dollars per passenger seat.

(c) In computing the annual license fee on each motor vehicle, trailer or semi-trailer, operating under a certificate of convenience and necessity or interstate permit as a freight-carrying vehicle, the vehicle shall be rated on the manufacturer's rated load capacity or the actual weight carrying capacity of the vehicle, which capacity shall be determined by the Public Service Commission at the time a certificate of convenience and necessity or interstate permit is issued. For each motor vehicle operating under a certificate of convenience and necessity or interstate permit as a freight-carrying vehicle, the annual license fee shall be as follows:

More than 1½ and not more than 2 tons	$25.00
More than 2 and not more than 3 tons	65.00
More than 3 and not more than 4 tons	100.00
More than 4 and not more than 5 tons	135.00
More than 5 and not more than 6 tons	175.00
More than 6 and not more than 7 tons	225.00
More than 7 and not more than 8 tons	275.00
More than 8 and not more than 9 tons	350.00
More than 9 tons	500.00

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Sec. 5274. Supervision and regulation—safety rules—accident reports—marking vehicles.—The Commission, in the exercise of the authority by this act vested in it, to license, supervise and regulate all motor carriers or contract haulers shall promulgate and mail or deliver to each holder of a certificate of convenience and necessity, interstate permit or contract hauler's permit hereunder, such safety rules and regulations as it may deem necessary to govern and control the operation of motor carriers or contract haulers over and along the public highways of this state, and the equipment to be used. Any such safety rules promulgated, in addition to any others deemed necessary by the Commission, shall include the following: (a) Every motor vehicle and all parts thereof shall be maintained

safe and sanitary condition at all times. (b) Every driver ployed by motor carriers or contract haulers shall be at t twenty-one years of age, of good moral character, and ll be fully competent to operate the motor vehicle under his rge. (c) Accidents arising from or in connection with the ration of motor carriers or contract haulers shall be reported the Commission in such detail and in such manner as the mmission may require. (d) The Commission shall require d every motor carrier or contract hauler shall have attached each unit or vehicle such distinctive marking as may be opted by the Commission. (e) No vehicle coming within e provisions of this act shall be operated at a speed in excess forty (40) miles per hour.

Sec. 5275. Penalties—misdemeanor.—Every owner, offi-r, agent, or employee of any motor carrier, contract hauler, d every other person, who violates or fails to comply with or o procures, aids or abets in the violation of any provision of is act, or who fails to obey, observe or comply with any order, cision, rule or regulation, direction, demand or requirement the Commission, and who procures, aids or abets any cor-ration or person in his failure to obey, observe or comply with y such order, decision, rule, direction, demand or regulation ereof shall be guilty of a misdemeanor and punishable by a e not exceeding one thousand dollars or by imprisonment in e county jail not exceeding one year, or by both such fine and prisonment.

Sec. 5276. Orders—service on carriers.—The orders and cisions of the Public Service Commission on the matters vered by this act shall be reduced to writing and a copy there-, duly certified, shall be served on the motor carrier and con-act hauler affected thereby through the United States mail, d such order and decision shall become operative and ef-ctive within thirty days after such service, and such motor rrier or contract hauler shall carry the provisions of said der into effect, unless said order is enjoined or set aside in a urt of proper jurisdiction.

Sec. 5277. Application of act.—It shall not be necessary the holder of any certificate of convenience and necessity or terstate permit, at the time of the effective date of this act to

make application for a certificate of convenience and necessity or an interstate permit under the provisions of this act. *Provided*, that the holder of every such certificate of convenience and necessity and/or interstate permit shall pay into the state treasury the fee, or fees required by section 5272 of this act, and in all other respects be subject to the provisions of this act. Every carrier, as in this act defined, actually operating in good faith, rendering satisfactory and dependable service by motor vehicle, on the first day of December, 1930, shall be presumed to be necessary for the public convenience and such carrier shall, in the absence of evidence overcoming such presumption, receive a certificate or permit for the routes established by them, or the territory they serve. *Provided*, nothing in this section shall be construed to prevent the Commission from revising or making a different rate of charge as provided in this act. *Provided, further*, that carriers engaged in bona fide operations, rendering satisfactory and dependable service, on the first day of December, 1930, shall have ninety days from the time this act becomes effective in which to file applications for certificates of convenience and necessity or permits and shall have the right to continue in operation until their applications have been decided by the commission.

Sec. 5278. Validation. If any section or provision of this act shall be found invalid by any court, it shall be conclusively presumed that this act would have been passed by the legislature without such invalid section or provision, and the act as a whole shall not be declared invalid by reason of the fact that one or more sections or provisions may be found to be invalid by any court.

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Sec. 5280. **Legislation enacted for sole purpose of promoting and conserving interests and convenience of public.**— It is hereby declared that the legislation herein contained is enacted for the sole purpose of promoting and conserving the interests and convenience of the public, and that no right, privilege, or permit granted or obtained under or by virtue of this act shall ever be construed as a vested right, privilege, or

permit; and the general assembly retains full legislative power over, concerning and pertaining to the subject or subjects legislated upon in this act and the power and right to alter, amend or repeal this act at its pleasure. *Provided*, the provision of this act shall not apply to trucks of one and one-half ton capacity and less.

Approved May 6, 1931.

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